No. 89-166

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

IN RE: LE PAPILLON, INC.,
IN RE: YVES & PAUL, INC.,
IN RE: AU CROISSANT, INC.,

YVES COURBOIS,
Petitioner,

v.

GANT REDMON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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August 28, 1989

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QUESTIONS PRESENTED

1. Whether a bankruptcy court's fee award should be overturned where, during the hearing on the fee, the judge overseeing the case found that the trustee had done an "outstanding job" and achieved a "remarkable turnaround;" where no party presented any evidence to substantiate any material negative allegations despite several opportunities to do so; where all parties were represented by experienced attorneys who negotiated a lower compromised fee; and where that lower, compromised fee fell within the reasonable range of litigation possibilities.

2. Whether the petitioner is estopped from appealing a settlement order where all alleged post-settlement revelations were known uncertainties more easily investigated by the petitioner than by the respondent.

3. Whether this Court should award attorney's fees and costs against the petitioner due to the frivolous, unsupported nature of this appeal, given the fact that the District Court found the initial appeal from the bankruptcy court to be "without merit" and especially where the District of Columbia Circuit awarded fees after finding, as a matter of fact, that this challenge was a "meritless" attack against a "valid settlement agreement."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES — Page

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Gant Redmon, hereby opposes the Petition for Writ of Certiorari. The petition is frivolous and, in addition to seeking its denial, Mr. Redmon seeks attorneys fees and double costs against the petitioner and his counsel. The Honorable United States District Judge Louis F. Oberdorfer found the appeal to the district court to be "without merit" and the United States Court of Appeals for the District of Columbia Circuit awarded

fees against Courbois and his counsel on appeal to that court finding that appeal to be a "meritless attack[] againt a valid settlement agreement."

OPINIONS BELOW

Mr. Redmon supplements the orders reproduced in petitioner's appendix ("App. ——") by reproducing in respondent's appendix ("R.App. ——") the bankruptcy court's finding of fact that alleged post settlement revelations were known uncertainties at the time of settlement. R.App. 1a.

In addition, certain factual findings made from the bench are also reproduced in the respondent's appendix. The factual finding made by the Honorable George Francis Bason, Jr., during the second day of hearings on Mr. Redmon's final fee application, that Mr. Redmon had done an "outstanding job" and was responsible for the "remarkable turnaround" experienced by the debtors is reproduced at R.App. 3a. The factual findings made by the Honorable Aubrey E. Robinson, Jr., Chief Judge, United States District Court for the District of Columbia, sitting as a bankruptcy judge, that, contrary to repeated denials by counsel for petitioner, petitioner and his counsel had in fact entered into a settlement agreement; that challenging the settlement agreement was "wasting judicial time;" and that the petitioner and his counsel were acting disingenuously, are to be found at R.App. 4a-9a.

Also included is the Order of February 20, 1987, wherein Judge Bason found that Courbois had forgone his opportunity for an oral hearing and had acquiesced to a paper hearing on interim fee applications. R.App. 10a-11a.

The Order of August 18, 1987, which set the commencement of the hearing of the final award of the fees as September 8, 1989, is found at R.App. 12a.

The bench ruling continuing the September 8, 1987 hearing to September 10, 1987 so that Mr. Schwartzbach could attend is included as R.App. 14a.

Also included is the Order of Confirmation Of Amended Plan Of Reorganization *In re: Le Papillon, Inc.*, No. 85-158, which relieved Mr. Redmon of his duties as Trustee on June 1, 1987, which recognized his claim for fees to be $298,000, and which was also executed by Mr. Schwartzbach. R.App. 16a-18a.

STATEMENT OF THE CASE

Gant Redmon was appointed trustee of the debtor corporations on October 20, 1985, approximately nineteen months after Yves Courbois caused the corporations to file petitions in bankruptcy. On November 19, 1985, the bankruptcy court also approved Mr. Redmon to act as attorney for the debtor corporations.

Prior to Mr. Redmon's appointment, Courbois failed to pay taxes, including employee withholding taxes; Courbois failed to file tax returns; and he failed to maintain adequate books and records. Furthermore, Courbois had plunged the debtor corporations into debilitating post-bankruptcy litigation. In fact, practically every facet of the bankruptcy was hotly litigated: more than $300,000 in administrative claims to attorneys and accountants had been accumulated, with no apparent end in sight; Courbois had changed lawyers three times; he had sued his first lawyer for fraud; his 50% shareholder Clare Smith, who had contracted to pay Courbois approximately $600,000 for the 50% interest five years before, was claiming $1,500,000 in damages; and the operations of the businesses were teetering on disaster. Furthermore, charges of industrial espionage abounded, equipment was damaged and falling into disrepair from lack of maintenance, and taxes were not being paid.

Through the efforts of Mr. Redmon, a counterclaim was mounted against Clare Smith resulting ultimately in the withdrawal of all her claims against Courbois and the debtor corporations; books were reconstructed; many tax returns for both pre-trustee periods as well as current periods were filed; litigation surrounding the debtors was brought under control, stemming the drain of financial and personnel resources; and plans prepared in cooperation with Courbois had been approved. As Courbois' own exhibits demonstrated in the record below, sales in the final post-trustee years were significantly higher than those in the immediately preceding, pre-trustee year. The businesses were doing in excess of $3,000,000 in sales annually and, for the first time, the corporations were made operationally viable. Indeed, the improvements due to Mr. Redmon's involvement was so dramatic that the bankruptcy judge having day-to-day supervision over the debtor corporations characterized Mr. Redmon's performance as "outstanding" and the debtors' improvement to be a "remarkable turnaround." R.App. 3a.

After having served as trustee for over eight months and after having his law firm serve the debtors as attorney for approximately seven months, Mr. Redmon filed his first application for interim attorney's fees on June 27, 1986. He filed his first application for approval of partial, interim trustee's fees on July 14, 1986. Courbois filed his opposition to those applications on September 10, 1986 wherein he requested a hearing. In that objection, Courbois made no specific allegations, seeking only an opportunity to present objections at a hearing.

As was demonstrated to the courts below, however, Courbois never made more than unsubstantiated, frivolous claims regarding Mr. Redmon's applications, despite every opportunity provided. Furthermore, contrary to the Courbois claim that the "bankruptcy court approved the first interim request without a hearing," Petition at p. 4, the bankruptcy court actually did provide an oppor-

tunity for an oral hearing and, when that opportunity was ignored, it conducted a paper hearing.

The record below demonstrates that on September 23, 1986 the bankruptcy court did hold an oral hearing wherein it considered, *inter alia*, the question of fees. The record also shows that Courbois presented no evidence at that time. R.App. 11a. Furthermore, the court granted Courbois permission to file further, supplemental objections by October 3, 1987. *Id.*

On October 10, 1986 Courbois filed and served his supplemental objections, which were unsubstantiated by affidavit or documentary evidence. Neither Courbois nor his attorney complained of any lack of opportunity to obtain evidence, examine witnesses or contest the information supplied by Mr. Redmon. They acquiesced to a "paper hearing" after failing to mount an evidentiary presentation on September 23, 1986.

On November 24, 1986, after reviewing all of the objections, including Courbois' out of time filing, the bankruptcy court granted interim trustee fees and stated as follows: "[T]he Court has considered the objections to the applications that have been filed . . . the relief requested herein is appropriate." R.App. 11a. A similar order issued that same date awarding interim attorney's fees.

Courbois then filed a motion for reconsideration of the foregoing orders and brought the court's attention to one of the very same issues presented in this appeal, *viz*, that "substantial amounts of post-petition debt to the Internal Revenue Service, incurred during the period of the trustee's tenure, are presently outstanding." [1] Just as in this

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[1] Unstated by the petitioner in his papers is the fact that due to the chaotic pre-trustee tenure by Courbois, the actual amount of the IRS debt was in question and was subject to negotiation with the Service.

petition, he also complained that no hearing had been held concerning the fees.

The bankruptcy court denied that request for reconsideration stating, in relevant part:

> Courbois complains that no court hearing was held before the Court entered its Order. However:
>
> (1) The Court has fully considered and taken into account the written objections raised by Courbois and others in making its decision as to the proper amount to be paid as interim compensation to the Trustee and his attorneys.
>
> (2) At a duly scheduled hearing in these cases held on September 23, 1986 this Court indicated its intention to rule on the papers, without a hearing, and to grant Courbois ten days within which to file more specific written objections. Courbois' counsel was present at that hearing and, as far as the undersigned Judge can recall, raised no objection to this procedure. The Court on October 28, 1986 issued a written order in accordance with this ruling, and Courbois on October 10, 1986 filed a supplemental memorandum in accordance with this ruling. That supplemental memorandum contains no objection to the procedure specified by the Court. Hence, Courbois has waived any right he may have had to a court hearing.
>
> (3) Section 102(1) of the Bankruptcy Code provides that "after notice and a hearing . . . means after . . . such opportunity for a hearing as is appropriate in the particular circumstances. . . ." Here, Courbois had an opportunity for a hearing on September 23, 1986 but did not take advantage of it. Instead, he agreed through counsel, to the arrangement suggested by the Court for decision on the papers without a hearing.

R.App. 10a-11a.

Notwithstanding the interim nature of the award, and in keeping with his relentless efforts at raising meritless arguments in order to needlessly multiply the proceedings, Courbois' counsel filed a Motion for Leave to Appeal that order, as well as a Notice of Appeal. Both the motion and appeal were denied.[2]

On May 1, 1987, the respondent, Gant Redmon, the debtors' counsel, Brian R. Seeber, together with Courbois' counsel herein all signed and submitted the Amended Disclosure Statements, the Amended Plans of Reorganization, and the proposed Orders of Confirmation for each of the debtor corporations. As is well known by petitioner's counsel, Courbois and his counsel had every opportunity to satisfy themselves as to the facts before signing. In fact, because Courbois continued to work on site as president and because he was in close daily communication with the trustee's manager, Courbois and his counsel had every opportunity to investigate, verify and participate in the formulation of the disclosure statements which his counsel signed.[3]

On May 26, 1987, the respondent, Gant Redmon, filed a final application for approval of trustee and attorney fees and costs. Docket Nos. 370-371.[4]

---

[2] This Court should note that Courbois opposed each and every one of Mr. Redmon's otner interim applications; filed a motion to remove the trustee; filed a motion to terminate the trustee's appointment; and has taken every step possible, including suing Mr. Redmon in an adversarial proceeding for over $1 million, to so multiply the proceedings as to win his fee dispute through attrition. The Court should also note that Mr. Schwartzbach's fee was up to over $33,000 by March of 1988. R.App. 15a.

[3] Unbeknownst to the trustee, Courbois had lured the trustee's manager into partnership on separate business ventures and thereby obtained improper influence over him. Courbios has now sued that manager in federal district court for claims arising out of those business ventures.

[4] Docket No. refers to the docket numbers reflected on the Bankrutcy Court Record in the underlying bankruptcy proceeding. It is not reproduced in the respondent's appendix because of its length.

On June 1, 1987, the Bankruptcy Court entered the Orders of Confirmation for each of the amended plans which also relieved Mr. Redmon of his duties as trustee in all three matters. See Order of Confirmation of Amended Plan of Reorganization, *In re: Le Papillon*, No. 84-158, R.App. 16a-18a. The plans recognized the claim to be $298,000. R.App. 17a.

On or about July 20, 1987, over six months after Courbois regained *de facto* control of the debtor corporations by virtue of the settlement and dismissal of the adversarial proceeding against Clare Smith, and over a month and a half after Courbois obtained *de jure* control by virtue of the trustee's discharge, Courbois filed his opposition to Mr. Redmon's final application for counsel fees and costs, wherein he reserved "the right to make specific objections to individual claims for time and for expenses . . . at the time of the hearing to be set by the Court." Docket No. 384. In addition, on or about July 17, 1987, Brian R. Seeber, ostensibly counsel for the debtor corporations, also filed an opposition on behalf of Courbois regarding the payment of "administrative expenses" wherein the request for a hearing was reiterated. Neither of Courbois' objections and requests for a hearing made any specific substantiated claim regarding Mr. Redmon's application. Finally, the United States also filed an opposition on or about July 22, 1987. Most of the issues raised by Courbois in this appeal and the appeals below were raised by those oppositions. Furthermore, each and every issue raised was a known uncertainty more easily investigated by Courbois, especially during the post-trustee period, than by Mr. Redmon.[5] Even while Mr. Redmon still served as trustee, Courbois had estab-

[5] Needless to say, allegations of misconduct are and were disputed by Mr. Redmon. Mr. Redmon acted consistent with the best interests of every party to this case. Indeed, as Mr. Redmon was prepared to prove at the evidentiary hearing, he acted in true fiduciary style, by elevating the interests of his principals above his own.

lished a close relationship with Mr. Redmon's manager by way of secret business dealings.

On August 18, 1987, the lower Court scheduled a hearing on Courbois' opposition to Mr. Redmon's application for September 8, 1987. R.App. 12a.

Courbois was free at that time and on September 10, 1987 to conduct whatever evidentiary presentation he desired and Mr. Redmon at that time came fully prepared for an evidentiary hearing.

As demonstrated below by the transcript of that hearing, which commenced on September 8, 1987, and which was concluded on September 10, 1987, there was a full ventilation of the factual issues now being raised in this appeal. At the September 10, 1987 hearing, which took place over three months after Courbois had assumed full operational and legal control over the debtors-in-possession, Courbois and his counsel agreed to a settlement of Mr. Redmon's fee application. Instead of the approximate $261,000 in fees and costs applied for, they, together with counsel for the debtor corporations, counsel for the government and Mr. Redmon, agreed to $157,000 in counsel fees and costs. See colloquy reproduced in Judge Oberdorfer's Order at pages 3-5. App. 7a-9a.

It was also during the September 10, 1987 hearing that the reasonableness of Mr. Redmon's fee was addressed. The bankruptcy judge who had supervised the case for, literally, years stated:

> And I have to say also I think Mr. Redmon has, notwithstanding the problems that have arisen, I have previously stated that, and I will repeat, that I think he has done an outstanding job in terms of the results achieved.
>
> * * * *

> [I]t seems to me that before the trustee came in the case things were going apart real fast. . . .
>
> * * * *
>
> But it seems to me that there has been a remarkable turnaround.

R.App. 3a.

Notwithstanding the agreement, counsel for Courbois would not sign the agreed order even though all other counsel did. App. 13a. Claiming post settlement revelations in a letter to the judge, counsel for Courbois sought to renege on the settlement agreement. All of the issues raised below and in this forum were raised in that letter. Later, Mr. Schwartzbach sought to stay the order awarding fees citing those same revelations.

The bankruptcy judge rejected Mr. Schwartzbach's attempt, finding that the post-settlement revelations were known uncertainties at the time of settlement:

> Courbois and his attorney both having expressly consented in open court to the compromise settlement of the fee dispute that is reflected in this Court's Order that Courbois appeals from, and both having been present in Court throughout a full discussion concerning uncertainties as to the extent of the Debtors' post trusteeship tax liabilities . . . the motion for stay pending appeal . . . is denied.

R.App. 1a.

Thereafter, in contemporaneous actions, Mr. Schwartzbach sued Mr. Redmon in an adversarial proceeding, filed a petition for an accounting in the bankruptcy dockets, and filed an appeal of the fee award in the district court below.

This Court should take note of his Honor Chief Judge Aubrey Robinson's analysis of Mr. Schwartzbach's tactics:

> BY THE COURT: I know exactly what's going on here, and I've been through the file. I know what's happening in here.

> We'll tell him anything, but we're going to—when we get all through, then we're going to turn around and sue him because he's got an insurance company. . . .
>
> * * * *
>
> You don't have to give any relief when you stand up representing clients in a court and make a representation to a judge. That record is as good as any release that can ever be written by anybody. You know it and I know it.
>
> * * * *
>
> The record speaks for itself, Mr. Schwartzbach, and I've read every word of that record, every word of it.

R.App. 7a.

Mr. Schwartzbach's adversarial proceeding in the bankruptcy court alleged the exact same issues as on appeal here. Mr. Redmon counterclaimed and filed a motion for summary judgment, together with a supporting affidavit and relevant documents. Courbois failed to create a disputed issue of material fact and his Honor Chief Judge Aubrey Robinson, sitting as a bankruptcy judge, granted Mr. Redmon's Motion for Summary Judgment thereby dismissing Courbois' claims. Mr. Redmon's counterclaims are still pending in that adversarial proceeding.

The appeal of the fee award to the District Court was exhaustively briefed. Unlike Courbois' appeal brief, which made allegations unsupported by the record, Mr. Redmon's brief was fully supported by reference to an appendix drawn from the voluminous record before the bankruptcy court.

After reviewing the record and the appropriateness of the fee, his Honor Louis F. Oberdorfer, United States District Judge, found, as a matter of fact:

> [Courbois'] claim that events subsequent to the settlement justified reneging on it are completely without merit.
>
> * * * *

> [T]he appeal is without merit and [Courbois] may well have abused the process of the Bankruptcy Court.

App. 10a.

Courbois did not stop there, however. He filed an appeal with the District of Columbia Circuit wherein that court summarily affirmed the district court and awarded attorneys fees and costs. His petition for rehearing and petition for rehearing en banc were also denied.

This petition for certiorari followed.

ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE THE BANKRUPTCY COURT DID CONSIDER THE REASONABLENESS OF THE FEE

There can be no question but that the award of Mr. Redmon's fee came after a hearing on the record which provided a full ventilation of the factual issues. Mr. Redmon had submitted his applications complete with time sheets, expense reports and calculations. The other parties had submitted their oppositions. The hearings on the application and objections began on September 8, 1987 and were concluded on September 10, 1987. There can be no question but that Courbois and his attorney had a full opportunity to investigate and prepare an evidentiary presentation for those hearings inasmuch as Courbois had been returned to full possession and legal control of the debtor corporations approximately three months before. Furthermore, there can be no question that the bankruptcy court made an independent determination of the value of Mr. Redmon's services and found them to be "outstanding" and responsible for the "remarkable turnaround" experienced by the debtors.[6]

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[6] The unique perspective of the bankruptcy court judge having had oversight responsibility cannot be disregarded. "Bankruptcy

Courbois' claim that the courts below failed to make an independent determination of the reasonableness of the fee award is a strawman having no basis in the factual record of these proceedings.

A. Where Settlement Negotiations Take Place, The Appropriate Standard Is To Determine Whether The Outcome Fell Within The Reasonable Range Of Litigation Possibilities

Where settlement negotiations have taken place the true standard to apply is to determine whether the outcome fell within the reasonable range of litigation possibilities. In a case analogous to this one, the Second Circuit upheld a compromise plan of reorganization stating:

> The courts generally favor compromise as compromises are "a normal part of process of reorganization." *Case v. Los Angeles Lumber Products Co.*, 308 U.S. 106, 130, 60 S.Ct. 1, 14, 84 L.Ed. 110 (1939). The Supreme Court has noted that "[i]n administering reorganization proceedings in an economical and practical manner it will often be wise to arrange the settlement of claims as to which there are substantial and reasonable doubts." *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424, 88 S.Ct. 1157, 1163, 20 L.Ed.2d 1 (1968) ("TMT").
>
> * * * *
>
> The appellee's position is the correct one. "The very purpose of a compromise to avoid determination of sharply contested and dubious issues." *Connecticut Railway & Lighting Co. v. New York, N.H. & H.R.R.*, 190 F.2d 305, 307 (2d Cir. 1951). The test to be applied where there is a judicial review of a consensual plan of reorganization is whether or not the terms of the proposed compromise fall within the reasonable range of litigation possibilities. See TMT,

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judges may be the only individuals involved in a bankruptcy with an overall view of the case." Matter of Baldwin-United Corp., 79 B.R. 321, 324 fn. 1 (Bnkcy. S.D. Ohio 1987).

supra, 390 U.S. at 424-425, 88 S.Ct. at 1163; *In re Penn Central Transportation Co.*, 596 F.2d 1102, 1114 (3rd Cir. 1979); *Florida Trailer & Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960); *In re California Associated Products Co.*, 183 F.2d 946, 949-50 (9th Cir. 1950); *In re Equity Funding Corp.*, 416 F.Supp. 132, 145 (C.D.Cal. 1975).

In re New York, New Hampshire and Hartford Railroad Company, 632 F.2d 955, 959-60 (2d Cir. 1980).

By definition, the reasonable range of litigation possibilities with respect to compensation for Mr. Redmon as trustee included the maximum allowable under statute. As the record demonstrates by way of counsels' signatures on the agreed Order Of Confirmation Of Amended Plan Of Reorganization, R.App. 16a-18a, the parties acknowledged Mr. Redmon's statutory, maximum claim to be $298,000. The compromise lowered the fee by over $100,000. Thus, the compromised fee, *ipso facto* fell within the reasonable range of litigation possibilities.

Thus, while the proposition relied upon by Courbois, that the bankruptcy court has an independent duty to determine the reasonableness of the fee award is true, the assertion that the reasonableness of the fee was not tested is false.

II. THE DISTRICT OF COLUMBIA CIRCUIT, LIKE EVERY OTHER CIRCUIT, RECOGNIZES THE NEED FOR AN INDEPENDENT REVIEW OF BANKRUPTCY FEE AWARDS

This Court need not grant certiorari in order to instruct the District of Columbia Circuit on the law regarding bankruptcy fee awards. The bankruptcy court for the District of Columbia has been applying the same standard as applied by all of the other courts for a very long time.

His Honor Chief Judge Aubrey Robinson has recognized the *Johnson v. Georgia Highway Express, Inc.*

standard since at least 1981. In appropriate circumstances the District Court for the District of Columbia has not hesitated to require substantive, *de novo* re-examinations when appropriate:

> On remand, this Court directed the Bankruptcy Court to conduct a more thorough and detailed substantive examination of the fees requested in relation to the value of the services performed. In doing so, the Court specifically suggested that section 330.05 of Collier on Bankruptcy be consulted for guidance . . . *In Re: Devers*, 12 B.R. [140] at 142 [Bkrtcy. D.C. 1981]. The criteria set forth in that section are those delineated in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (6th Cir. 1974) . . . . The use of these particular criteria has become the established legal standard and practice employed by bankruptcy courts in examining fee awards.

In re Devers, 33 B.R. 793, 797 (D.D.C. 1983).

III. THE COURT- SHOULD AWARD DOUBLE FEES AND COSTS TO COMPENSATE THE RESPONDENT AND TO DETER FURTHER ABUSE

Attacking a settlement without just cause is a serious matter. Besmirching the character of a member of the Bar and officer of this Court, who through honest and skillful endeavor, was responsible for the "remarkable turn around" experienced by the debtors, is reprehensible.

In *Bernstein v. Brenner*, 320 F.Supp. 1080 (D.D.C. 1970), the District of Columbia Circuit saw through and punished the unscrupulous methods which mirror so closely those employed by Courbois and Schwartzbach in these proceedings. While in *Bernstein* "the complaint was amended three times to reflect altered theories of action or other developments," in this case Schwartzbach has made repeated claims against Mr. Redmon's integrity which he has repeatedly failed to substantiate. He made them simultaneously in three places, the complaint in the

adversary proceeding, the appeal, and the petition for an accounting. Now he appeals after being told by the District Court and the Circuit Court that his appeal was meritless. In *Bernstein* the Court recognized that the case could have been presented "at the outset without the wearing, time-consuming, expensive pretrial activity which is so graphically shown by the jacket in [the] case." *Id.* One need only review the Bankruptcy Court's 38 pages of docket sheets with its 422 entries, so many of which are Schwartzbach's, to appreciate the similarity to *Bernstein*. Indeed His Honor Judge Robinson recognized these tactics as an abuse and a waste of judicial time. On April 6, 1988, Chief Judge Aubrey Robinson took issue with Mr. Schwartzach's tactics:

> MR. SCHWARTZBACK: What Your Honor is addressing is the case that's on appeal, not the case that's in the complaint.
>
> THE COURT: This is—I know how you split it up, Mr. Schwartzback, and it's good lawyering. You can call it good lawyering. I don't think it's good lawyering 'cause I think *you're wasting judicial time.* But I can't enjoin you from filing lawsuits. I know exactly what's gone on here, and I've been through the file. *I know what's happening in here.*
>
> We'll tell him anything, but we're going to—when we get all through, then we're going to turn around and sue him because he's got an insurance company. Then we're going to reopen all the stuff that we've been complaining about, about double-dipping, et cetera, et cetera, et cetera. *Well, that doesn't wash. You know that doesn't wash. It won't wash with me. That's the way you set it up.*

R.App. 6a-7a (emphasis added).

The *Bernstein* court recognized that "it is common experience that charges of mismanagement and fraud against fiduciaries will speedily blast the best reputations, and it is also common experience that once destroyed they

may not easily be restored. . . The same might be said for charges of fraud and breach of fiduciary obligation against an attorney." *Id.* Indeed, the same thing can be said in this case with respect to an attorney who has acted as trustee.

In virtually indistinguishable circumstances the District of Columbia Circuit, on its own motion, ordered an appellant to "pay the costs and counsel fees reasonably incurred by appellees in responding to an appeal that fully warrants the characterization frivolous." *American Security Van Lines, Inc. v. Gallagher*, 782 F.2d 1056 (D.C. Cir. 1986). In the *American Security Van Lines* case the appellant, an attorney, dishonored an agreement settling an action. Just as in this case, the court below characterized the attacks on the settlement as "meritless." Just as in this case, appellant relied upon *Autera v. Robinson*, 419 F.2d 1197 (D.C. Cir. 1949), a precedent which Judge Robinson found completely inapplicable. ("That's not this case by any stretch of the imagination". R.App. 8a.) Just as in this case, the actions taken by appellant have unconscionably delayed secure receipt of the periodic payments "bargained for" and has "multipl[ied] the proceedings unreasonably and vexatiously."

In this case, however, there is an additional aggravating circumstance. The court below not only characterized the appeal as "meritless," it specifically incorporated the *American Security Van Lines* case as support for the action it took. Thus, enhanced sanctions are warranted in this appeal.

This has truly been an abuse of the Court's process. In April of 1988, Schwartzbach represented to His Honor Judge Robinson: "Oh everybody's getting paid, Your Honor, everybody but Mr. Redmon." R.App. 9a. Yet the petitioner has defeated Mr. Redmon's right to his already negotiated fee by forcing him to litigate and re-

litigate each step of the way. Absent sanctions, Courbois and Schwartzbach will have, with impunity, made a mockery of the order awarding fees.

CONCLUSION

WHEREFORE, for the foregoing reasons, the respondent Gant Redmon, respectfully requests that the petition for certiorari be denied and that double attorneys fees and costs be awarded against Courbois and his counsel jointly and severally.

Respectfully submitted,

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* Counsel of Record

August 28, 1989

APPENDIX

APPENDIX TABLE OF CONTENTS

APPENDIX

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 84-00158

IN RE: LE PAPILLON, INC.
d/b/a AU PIED DE COCHON

Case No. 84-00159

YVES & PAUL, INC.
d/b/a AUX FRUITS DE MER

Case No. 84-00160

AU CROISSANT, INC.
d/b/a AU CROISSANT CHAUD

ORDER

[Filed Dec. 22, 1987]

This cause having come before the Court on the motion of Yves Courbois for a stay pending appeal of this Court's order of December 2, 1987, approving payment of fees to the trustee and his attorneys, and Courbois and his attorney both having expressly consented in open court to the compromise settlement of the fee dispute that is reflected in this Court's Order that Courbois now appeals from, and both having been present in court throughout a full discussion concerning uncertainties as to the extent of the Debtors' post-trusteeship tax liabilities, it is

ORDERED, that the motion for stay pending appeal be, and hereby is, DENIED.

Dated: December 21, 1987.

/s/ Geo. Bason, Jr.
GEORGE FRANCIS BASON, JR.
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

IN THE MATTER OF:

84-00158 LE PAPILLON, INC.
84-00159 YVES & PAUL, INC.
84-00160 AU CROISANT, INC.

[Filed Feb. —, 1988]

Thursday, September 10, 1987
Washington, D.C.

The proceedings in the above-captioned matter came on before the HONORABLE GEORGE FRANCIS BASON, JR., United States Bankruptcy Court Judge, commencing at 4:00 p.m.

APPEARANCES:

On Behalf of the Debtor Corporation
BRIAN S. SEEBER, Attorney-at-law

On Behalf of the Former Trustee
GANT REDMON, Attorney-at-law

On Behalf of the IRS
ROBERT GORDON, Attorney-at-law

On Behalf of Mr. Corboi
SAUL SCHWARTZBACK, Attorney-at-law

* * * *

[3] THE COURT: And I have to say also I think Mr. Redmon has, notwithstanding the problems that have arisen, I have previously stated that, and I will repeat, that I think he has done an outstanding job in terms of the results achieved.

Now, there may be other problems since there are some other problems but so far as benefit to these three estates, it seems to me that before the trustee came in the case things were going apart real fast and whether it was because of the Russian defector or something else. In other words, it may have been nothing to do with Mr. Redmon but I'm prepared to give him the benefit of the doubt until I hear something else.

But it seems to me that there has been a remarkable turn around. Be that as it may, I hope that there will be a spirit of accommodation among counsel and I recognize * * *

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Bankruptcy Case No. 88-0003

UNITED STATES OF AMERICA

v.

REDMON, *et al.*,
Defendants.

[Filed April 19, 1988]

Washington, D.C.
April 6, 1988

The above-entitled matter came on for hearing before the Honorable AUBREY E. ROBINSON, JR., Bankruptcy Judge, United States District Court, at 1:45 p.m.

APPEARANCES:

SOL SCHWARTZBACK, ESQ.
For the Government

W. STEVEN PALEOS, ESQ.
For the Defendants

* * * *

[13] I'd like to hand up to Your Honor a copy of the September 10th hearing. That's where Your Honor will find what counsel wants to call an agreement, but which the record clearly reflects was no more than a withdrawal of objections and leading—

THE COURT: That's not so.

MR. SCHWARTZBACK: I can read to Your Honor—

THE COURT: I have read the whole transcript for those two matters. That's not so.

MR. SCHWARTZBACK: Your Honor pleases—

THE COURT: I'll hear you out, but that's not so.

MR. SCHWARTZBACK: May I refer to those portions of the record?

THE COURT: Yes.

MR. SCHWARTZBACK: On page 10 of the September hearing, the fifth line by the Court:

> "Now, what about the question of bounced checks and all those things that were raised in a couple days ago? Is there still a live controversy, or is that something that the Court should—"

Stops.

And Mr. Redman: "Your Honor," and he goes ahead on line 11, "I don't know what the resolution of that issue is."

THE COURT: That's a separate and distinct matter, [14] and that's not the agreement that we're talking about. That's the matter that involves Internal Revenue. That is not covered in this.

MR. SCHWARTZBACK: If Your Honor pleases—

THE COURT: That is strictly to do with the argument that was ongoing about the bank—about the bounced checks and about the post-petition non-payment of monies that the Government—

MR. SCHWARTZBACK: Exactly.

THE COURT: But that's not the agreement we're talking about.

MR. SCHWARTZBACK: That's correct.

THE COURT: All right.

MR. SCHWARTZBACK: Nor will you find in the file an agreement by Mr. Courbois, or by any of the corporations, to do anything other than to withdraw its objection—

THE COURT: To what?

MR. SCHWARTZBACK: —to the amount of fee.

THE COURT: Yes.

MR. SCHWARTZBACK: That's all, the amount of fee.

THE COURT: I understand that.

MR. SCHWARTZBACK: All right. Then the complaint—if Your Honor understands that, when the complaint is in six counts.

THE COURT: I read the complaint. I have the [15] docket before me, the record that's on appeal. I've read it all.

MR. SCHWARTZBACK: And none of those counts have anything to do with the payment fee.

THE COURT: I understand that.

MR. SCHWARTZBACK: Now, if Your Honor pleases, the only agreement that was made was a withdrawal of an objection to fee. In the complaint—

THE COURT: I'm going to agree to pay you $100,000 attorneys fees and trusteee fees as a final of all I owe you, and I reserve the right to come back and sue you because you're not entitled to any of it because you didn't do anything right. That's what you're trying to tell me.

MR. SCHWARTZBACK: No, Your Honor, I'm not.

THE COURT: That's exactly what you've done.

MR. SCHWARTZBACK: No, Your Honor, that's not what I've done.

THE COURT: That's exactly what you've done.

MR. SCHWARTZBACK: What Your Honor is addressing is the case that's on appeal, not the case that's in the complaint.

THE COURT: This is—I know how you split it up, Mr. Schwartzback, and it's good lawyering. You can call

it good lawyering. I don't think it's good lawyering 'cause I think you're wasting judicial time. But I can't enjoin you [16] from filing lawsuits. I know exactly what's gone on here, and I've been through the file. I know what's happening in here.

We'll tell him anything, but we're going to—when we get all through, then we're going to turn around and sue him because he's got an insurance company. Then we're going to reopen all the stuff that we've been complaining about, about double-dipping, et cetera, et cetera, et cetera. Well, that doesn't wash. You know that doesn't wash. It won't wash with me. That's the way you set it up.

MR. SCHWARTZBACK: Your Honor is the judge here—

THE COURT: That's right.

MR. SCHWARTZBACK: There's nothing—

THE COURT: I know, I know.

MR. SCHWARTZBACK: There's nothing in the record, Your Honor, that—where we gave any release—that we relieved Mr. Redmon of any liability—

THE COURT: You don't have to give any relief when you stand up representing clients in a court and make a representation to a Judge. That record is as good as any release that can ever be written by anybody. You know it and I know it.

MR. SCHWARTZBACK: Absolutely, and I never made such a representation to any Judge that I released Mr. Redmon on behalf of Mr. Courbois—

[17] THE COURT: I'm telling you you didn't have to release because the record speaks for itself. The record speaks for itself, Mr. Schwartzback, and I've read every word of that record, every word of it.

MR. SCHWARTZBACK: May I point out to Your Honor certain cases that have been cited by counsel? One of them is the *Autera v. Robinson* case found in 419 F.2d 1197.

THE COURT: Well, I've read your quotations from that case, and it has no application to this because the reason the Judge—Robinson remanded that case is that there was a clear question as to the capability of the woman to enter into any agreement because of her physical condition. And he said under those circumstances, he sent it back and he said, I want a factual record made as to what her physical condition was, not whether or not there was an agreement. That was the *Autera* case.

MR. SCHWARTZBACK: And that's correct, Your Honor.

THE COURT: That's not this case.

MR. SCHWARTZBACK: Your Honor, this case—

THE COURT: That's not this case by no stretch of your imagination, Mr. Schwartzback. That's not this case. There's no contention here that somebody was non-compus or was whatever. That's not this case.

MR. SCHWARTZBACK: Your Honor pleases, in this case—

* * * *

[24] THE COURT: All right.

MR. SCHWARTZBACK: I agree with both of—

THE COURT: Yes.

MR. SCHWARTZBACK: I agree with both of your statements, Your Honor, that the fee was settled on that date—

THE COURT: That's exactly right.

MR. SCHWARTZBACK: —and that Internal Revenue was not settled on that date, but nor settled on that date were the allegations contained in our complaint.

THE COURT: I'll bet you they were.

MR. SCHWARTZBACK: Well, there's nothing in the record to indicate it.

THE COURT: Oh, yes there is to. You'll see it. If you don't see it now, you will, eventually. Meanwhile, nobody's getting anything.

MR. SCHWARTZBACK: Oh, everybody's getting paid, Your Honor, everybody but Mr. Redmon. Every creditor and the Internal Revenue—

THE COURT: Well then, what's the Government—is the Government satisfied with the way it's being paid?

MR. SCHWARTZBACK: Mr. Gordon?

MR. GORDON: Your Honor, as far as the current 11—the current payments are being made. In fact, Your Honor,—looking at the record that we had opposed the Motion to * * *

* * * *

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 84-00158
(Chapter 11)

IN RE LE PAPILLON, INC.
d/b/a AU PIED DE COCHON

Case No. 84-00159
(Chapter 11)

YVES AND PAUL, INC.
d/b/a AU FRUIT DE MER

Case No. 80-00160
(Chapter 11)

AU CROISSANT, INC.
d/b/a AU CROISSANT CHAUD

ORDER

[Filed Feb. 20, 1987]

Before the Court is a motion filed by the corporate debtors' principal Yves Courbois ("Courbois") for reconsideration of this Court's Order entered November 26, 1986 authorizing payment of interim fees to the Trustee and the Trustee's attorneys, together with the Trustee's opposition. Courbois complains that no court hearing was held before the Court entered its Order. However:

(1) The Court has fully considered and taken into account the written objections raised by Courbois and others in making its decision as to the proper amount to

be paid as interim compensation to the Trustee and his attorneys.

(2) At a duly scheduled hearing in these cases held on September 23, 1986 this Court indicated its intention to rule on the papers, without a hearing, and to grant Courbois ten days within which to file more specific written objections. Courbois' counsel was present at that hearing and, as far as the undersigned Judge can recall, raised no objection to this procedure. The Court on October 28, 1986 issued a written order in accordance with this ruling, and Courbois on October 10, 1986 filed a supplemental memorandum in accordance with this ruling. That supplemental memorandum contains no objection to the procedure specified by the Court. Hence, Courbois has waived any right he may have had to start a court hearing.

(3) Section 102(1) of the Bankruptcy Code provides that "'after notice and a hearing' . . . means after . . . such opportunity for a hearing as is appropriate in the particular circumstances. . . ." Here, Courbois had an opportunity for a hearing on September 23, 1986 but did not take advantage of it. Instead, he agreed through counsel to the arrangement suggested by the Court for decision on the papers without a hearing. Moreover, since the Court has simply made an interim award, Courbois will have ample oppoprtunity later, when the Trustee's final application comes before the Court, to raise whatever objections he deems appropriate.

NOW THEREFORE IT IS ORDERED that Courbois' motion for reconsideration is denied.

Dated: February 18, 1987.

/s/ Geo. Bason, Jr.
GEORGE FRANCIS BASON, JR.
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 84-00158

IN RE: LE PAPILLON, INC.
d/b/a AU PIED DE COCHON

Case No. 84-00159

YVES & PAUL, INC.
d/b/a AUX FRUITS DE MER

Case No. 84-00160

AU CROISSANT, INC.
d/b/a AU CROISSANT CHAUD,
Debtors.

ORDER

[Filed August 18, 1987]

Upon consideration of the motion by GANT REDMON for a continuance of the hearing on the former Trustee's Application for Approval of Payment of Counsel Fees and Costs and Trustee's Fees and objections filed thereto by Yves Courbois, the debtor corporations, and the Internal Revenue Service, and it appearing that good cause has been shown therefor and that the Motion should be granted, it is

ORDERED that the above-described hearing be, and it hereby is, continued to September 8, 1987, at 11:00 o'clock a.m.

/s/ Geo. Bason, Jr.
GEORGE FRANCIS BASON, JR.
United States Bankruptcy Judge

Dated: August 10, 1987.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

Bankruptcy Case No. 84-158

IN RE: LE PAPILLON,

Debtor.

Bankruptcy Case No. 84-159

IN RE: YVES & PAUL,

Debtor.

Bankruptcy Case No. 84-160

IN RE: AU CROISSANT,

Debtor.

Washington, D.C.
Tuesday, September 8, 1987

The above-entitled matter came on for hearing before the Honorable George Francis Bason, Jr., United States Bankruptcy Judge for the District of Columbia, in courtroom number twenty-two.

APPEARANCE OF COUNSEL:

On Behalf of the Debtor Corporation:
BRIAN R. SEEBER, Attorney at Law

On Behalf of the IRS:
ROBERT GORDON, Attorney at Law

On Behalf of the United States Trustee's Office:
DENNIS EARLY, Attorney at Law

The Former Trustee:
GANT REDMON, Attorney at Law
ANN RAY SMITH, Attorney at Law

* * * *

[18] of procedure Mr. Redmon might suggest for dealing with it.

MR. REDMON: Okay. One last try, Your Honor.

THE COURT: Okay.

MR. SEEBER: Your Honor, I spoke with the principal of the debtor here from the courtroom just a few moments before Your Honor came on. I tried to get this to the last moment. I know what should be done, I'm just not able to do it today.

And in the scheme of things, what we're talking about is a relatively insignificant difference. It is a difference which, with Mr. Schwartzback not here, as Your Honor has seen him in court, he can be a useful tool if he is aimed the right way. He certainly has considerably more influence over one of the parties involved than I do. If I had him in hand, I could have accomplished a lot more than I was able to do today by phone.

THE COURT: He will be back tomorrow?

MR. SEEBER: Tomorrow.

THE COURT: If we were to continue this matter until 4 00 o'clock on Thursday, do you think that would help?

MR. REDMON: Yes. I'm certainly available, Your Honor.

MR. SEEBER: I'm available, Your Honor.

MR. GORDON: I'm available, Your Honor.

* * * *

Law Offices
SAUL M. SCHWARTZBACH
Suite 202
4710 Bethesda Avenue
Bethesda, Maryland 20814
301-951-6391

March 2, 1988

Mr. and Mrs. Yves Courbois
8453 Broken Arrow Court
Annandale, Virginia 22003

STATEMENT OF ACCOUNT

FOR PROFESSIONAL SERVICES RENDERED:
For all matters, namely: Chapter XI, Bakery
M Street Lease, Sloan and Redmon

Prior Statement February 5, 1988	$29,502.80
Received nothing on account in February, 1988	
Balance Forward	$29,502.80
Attorney services for February, 1988	
22.75 hours @ $150.00	3,412.50
Support staff services	
2.00 hours @ $50.00	$200.00
TOTAL DUE THIS STATEMENT	$33,115.30

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

Case No. 84-00158
(Chapter 11)

IN RE: LE PAPILLON, INC.
d/b/a AU PIED DE COCHON,
Debtor

ORDER OF CONFIRMATION OF
AMENDED PLAN OF REORGANIZATION

At WASHINGTON, D.C., this 1st day of June, 1987:

Upon the filing of the Amended Plan of Reorganization dated April 30, 1987 under Chapter 11 of the Bankruptcy Code by the debtor, Le Papillon, Inc. d/b/a Au Pied de Cochon, the Trustee Gant Redmon, and Yves Courbois, President of the debtor, of Washington, a copy of said Amended Plan of Reorganization and Amended Disclosure Statement having been transmitted to the holders of all claims in interest; and upon a hearing and confirmation of said Amended Plan of Reorganization having been held on May 26, 1987; and,

IT HAVING BEEN DETERMINED BY THE COURT AFTER SAID HEARING:

1. That the Plan of Reorganization complies with the applicable provisions of Chapter 11 of the Bankruptcy Code.

2. That the Proponent of the Plan complies with the applicable provisions of Chapter 11 of the Bankruptcy Code.

3. That the Plan has been proposed in good faith and not by any means forbidden by law.

(d) Renner, Kositzka & Wicks: Although this claim was estimated in the amount of Fifteen Thousand Dollars ($15,000.00), the actual claim is now in the approximate amount of Nine Thousand Dollars ($9,000.00), which is to be paid at the rate of One Thousand ($1,000.00) per week beginning June 1, 1987, and continuing on each successive Monday until the claim is paid in full.

(e) Gant Redmon, Trustee herein, has a claim in the approximate amount of Two Hundred Fifty-Four Thousand Dollars ($254,000.00) in stautory Trustee's commissions, and Forty-Four Thousand Dollars ($44,000.00) in attorney's fees. The debtor is directed to forthwith remit the sum of Ten Thousand Dollars ($10,000.00) against heretofore allowed attorney's fees, and the balance of said claim is to be allowed upon Application to the Court and hearing thereon. Upon allowance, the balance of said claim is to be paid pursuant to the Amended Plan.

The above-described claims are also against the debtors in Case Nos. 84-00158 and 84-00159, and the payments herein are the same as those referred to in the Confirmation Orders entered in said cases. The sums described herein represent the total owing, however, and the sums referred to herein represent the total to be paid for all three debtors.

9. The language of the Amended Plan is to be construed to require that the post-petition claim of Internal Revenue Service must be fully satisfied, including all properly charged interest and penalties thereon.

10. That confirmation of the Plan is not likely to be followed by liquidation, or the need for further financial reorganization of the Debtor, or any successor to the Debtor, under the Plan.

Gant Redmon, Trustee, is hereby discharged from office, and his bond is released, and the debtor is returned to

full management, possession and control of its assets as provided in Article XII of the Amended Plan. The Trustee is to remain a party in interest pursuant to 11 U.S.C. § 1109, to bring to the attention of the Court any default of the debtor in the performance of the Amended Plan as confirmed hereby.

NOW THEREFORE, IT IS ORDERED: That the Amended Plan filed by the Debtor on April 30, 1987 is CONFIRMED.

/s/ Geo. Bason, Jr.
GEORGE FRANCIS BASON, JR.
Judge
United States Bankruptcy Court
for the District of Columbia

WE CONSENT TO ENTRY OF THIS ORDER:

/s/ Brian R. Seeber
BRIAN R. SEEBER — Counsel for Debtor
GINS & SEEBER, P.C.
Suite 200
2021 "L" Street, N.W.
Washington, D.C. 20036-4909
(202) 785-9223

/s/ Gant Redmon
GANT REDMON — Trustee
Suite 301
510 King Street
Alexandria, VA 22314-3172
(703) 549-4800

/s/ Saul Schwartzbach
SAUL SCHWARTZBACH — Counsel for Yves Courbois
Suite 611
1000 Connecticut Avenue, N.W.
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